Gundy v. United States: Gunning for the Administrative State

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From the outset, Herman Gundy's case was a potentially very important, yet rather curious one for the Supreme Court. Gundy, convicted of providing cocaine to a young girl and raping her, argued that Congress violated the nondelegation doctrine when it ceded authority to the U.S. Attorney General to specify the applicability of the federal Sex Offender Registration and Notification Act (SORNA) to individuals convicted before its 2006 enactment. Gundy challenged SORNA because the Attorney General decided to make SORNA retroactive, resulting in Gundy's federal felony conviction under SORNA after he travelled interstate in 2012 without notifying authorities.

The Court's decision to consider the case, numbering among the precious few it now hears each term,[1] came as a surprise, especially given that the Court had not found a delegation violation in over eighty years[2] and all federal circuit courts addressing the issue had rejected SORNA nondelegation challenges.[3] The fact that at least four Justices voted to hear the case strongly suggested that the question warranted reconsideration, raising the possibility that the Court would resuscitate the nondelegation doctrine, and call into question myriad congressional delegations of authority to agencies.

That a convicted sex offender such as Herman Gundy, usually touted by conservatives as a poster boy for tough-on-crime-policies like SORNA, should be the person to revive the nondelegation doctrine, a cause long championed by conservatives,[4] was ironic. The case, moreover, was not without complication for liberal Justices, who are typically fans of the administrative state in areas such as workplace safety and environmental protection, but are often troubled by harsh criminal justice policies like SORNA.

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1 *See* Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 240 (2014).

2 *See* A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 530 (1935); Pan. Refining Co. v. Ryan, 293 U.S. 388, 430–33 (1935).

3 *See* Gundy v. United States, 139 S. Ct. 2116, 2122 (2019).

4 *See, e.g.*, PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); DAVID S. SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

When Gundy was argued the first week of the Court's October Term, only eight Justices were on the bench (Justice Kavanaugh was nominated but not yet confirmed). As the months passed, yet no decision came, it became apparent that Gundy's claim was not a slam-dunk. Not until June 20, at the very end of the 2018 Term, did the Court resolve the suspense, with five Justices voting to uphold the SORNA delegation.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, staved off the challenge in a plurality opinion, with Justice Alito concurring in the judgment. In doing so, however, Justice Alito made clear his reluctance to side with his four colleagues, and his disdain for the nondelegation doctrine more generally, writing that

> [i]f a majority of this Court were willing to reconsider the approach [to nondelegation] we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.
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> Because I cannot say that the statute lacks a discernible standard that is adequate under the approach this Court has taken for many years, I vote to affirm.[5]

Of course, we cannot say for sure why Justice Alito sided with Justice Kagan and the three others. If he had cast his lot with his three dissenting colleagues, the vote would have been a 4-4 per curiam decision, meaning that the Second Circuit's decision upholding SORNA would remain intact. Perhaps he could not stomach the idea of a convicted sex offender, and many thousands of others like him, would get the benefit of his vote (even if it meant that the outcome would stay the same). Alternatively, the Court could have bound the matter over to its next term, when presumably all nine Justices would be in place, but this obviously was not the Justices' preference either.

In the end, *Gundy* did not live up to its fanfare, and Justice Kagan's opinion for the plurality, as discussed later, was unconvincing. A case with all the ingredients to be a blockbuster in the end turned out to be decidedly non-precedential.

Justice Gorsuch's lengthy dissent (seventeen pages, compared to Justice Kagan's nine), on the other hand, is worthy of note. The Gorsuch dissent, joined by Chief Justice Roberts and Justice Thomas, could well have long-term consequences because in it Justice Gorsuch provides what might be the blueprint for the next nondelegation challenge, which, with the ascendance of Justice Kavanaugh (a critic of delegation)[6] could soon become the law of the land. Presumably, Justice Alito, finding the next challenge something other than "freakish," will side with his four

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[5] *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in judgment).

[6] John Yoo & James C. Phillips, *With Kavanaugh, the Court Should Tame the Administrative State*, NAT. REV. (Oct. 25, 2018, 6:30AM), https://www.nationalreview.com/2018/10/supreme-court-brett-kavanaugh-administrative-state/.

conservative colleagues, and five Justices will decide the contours (and maybe the existence) of the federal administrative state.[7]

In the final analysis, *Gundy* not only was a disappointment, it was a lost opportunity for the Court to provide a more robust nondelegation doctrine, one likely having appeal across the Court's political spectrum. In particular, the Court could have enunciated a new, more demanding standard applicable only to congressional delegations of criminal justice authority like SORNA. Such an approach, which would require more guidance from Congress regarding delegated decisions and thus constrain delegation, would be justified given the recognized distinctiveness of criminal sanctions. Although adopting the alternative would have its analytic challenges, it would have ancillary benefits, including long-needed clarification of criteria used to distinguish civil and criminal sanctions.

I. *GUNDY* FACTS AND THE PLURALITY OPINION

In 2006, as part of the Adam Walsh Child Protection and Child Safety Act of 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA).[8] SORNA, the most recent of federal laws dating back to 1994 pressuring states to enact stricter sex offender registration and notification laws,[9] is a complex law with many provisions.[10] Among them is one making it a federal felony for individuals subject to registration to travel across state lines without apprising state authorities of their new address, the offense Gundy committed.[11]

Of particular importance to Gundy's case, however, was the SORNA provision concerning which convicted sex offenders were subject to registration coverage. The law made clear that individuals at or near their time of sentencing or completing a prison term at the time of SORNA's enactment would be required to register and

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[7] Outright rejection of delegation, the nuclear option, could well be in the cards given the willingness of several Justices, especially in the conservative bloc of the Court, to reject settled precedents. *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019) (dispensing with state-litigation Takings Clause standing requirement of Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U. S. 172 (1985)); Gamble v. United States, 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring) (providing lengthy critique of stare decisis in constitutional cases).

[8] Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901 (2006).

[9] *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 55–66 (2009).

[10] For detailed discussion of the provisions see Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 8 OHIO ST. J. CRIM. L. 51, 76–84 (2008).

[11] SORNA makes it a crime for a person who is "required to register" under the Act and who "travels in interstate or foreign commerce" knowingly to "fai[l] to register or update a registration . . . " 18 U.S.C. § 2250(a) (2016).

be subject to its provisions.[12] Congress did not, however, directly address the many thousands of individuals released from prison before SORNA's enactment date in 2006. SORNA merely provided that the U.S. Attorney General "shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . . ."[13]

Based on the delegated authority, the Attorney General issued an interim rule in late February 2007 specifying that the SORNA registration requirement was fully retroactive, applying to "sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]."[14] The rule was implemented immediately, before providing notice and receiving public comments, by invoking a "good cause" exception contained in the Administrative Procedure Act.[15] The Attorney General thereafter received a large volume of comments, including from states strongly objecting to the retroactivity decision.[16] In late December 2010, the Attorney General issued the final rule, which preserved the original stance requiring retroactivity.[17]

At the outset of her opinion in *Gundy*, Justice Kagan stated that the SORNA delegation "easily passes constitutional muster."[18] She thereafter laid out the core components of the nondelegation doctrine. Article I of the Constitution, she wrote, provides that "'[a]ll legislative Powers granted shall be vested in a Congress of the United States,'"[19] adding that the Court long recognized that Congress may not cede to another branch of government "'powers which are strictly and exclusively legislative.'"[20] The rule against transfer of lawmaking authority, however, is not absolute. Rather, Congress can delegate its authority if it "'lay[s] down by legislative

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[12] 34 U.S.C. § 20913(b) (2017).

[13] 34 U.S.C. § 20913(d) (2017).

[14] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894 (Feb. 28, 2007); *see also* 28 C.F.R. § 72.3 (2011) (specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]").

[15] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,896 (Feb. 28, 2007) (referencing 5 U.S.C. § 553(b)(B), (d)(3) (2006)).

[16] *See* Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 1002 (2010).

[17] Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010).

[18] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

[19] *Id.* at 2123 (quoting U.S. CONST., art. I).

[20] *Id.* (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[21]

The question thus becomes, Justice Kagan wrote, whether the statute(s) delegating authority provide "an intelligible principle to guide the delegee's use of discretion."[22] To Justice Kagan, examination of the SORNA statutory "text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues."[23] In support of her view that the feasibility and means of implementation—not applicability—of retroactivity was the authority delegated, Justice Kagan invoked *Reynolds v. United States*,[24] where the Court held that SORNA's registration requirements did not apply to pre-SORNA sex offenders until the U.S. Attorney General so specified.[25] She pointed to language in *Reynolds* reasoning that delegation was needed because "'*instantaneous* registration' of pre-Act offenders 'might not prove feasible,' or '[a]t least Congress might well have so thought.'"[26] Based on *Reynolds*, Justice Kagan reasoned

> the Attorney General's role . . . was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. That statutory delegation, the Court explained, would "involve[] implementation delay." But no more than that. Congress had made clear in SORNA's text that the new registration requirements would apply to pre-Act offenders. So (the Court continued) "there was no need" for Congress to worry about the "unrealistic possibility" that "the Attorney General would refuse to apply" those requirements on some excessively broad view of his authority [delegated by SORNA]. Reasonably read, SORNA enabled the Attorney General only to address (as appropriate) the "practical problems" involving pre-Act offenders before requiring them to register. The delegation was a stopgap, and nothing more.[27]

To support her view that the need to register pre-Act offenders was "front and center in Congress's thinking," Justice Kagan cited floor statements by members of

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[21] *Id.* (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[22] *Id.*

[23] *Id.* at 2123–24.

[24] Reynolds v. United States, 565 U.S. 432 (2012).

[25] *Id.* at 435.

[26] *Gundy*, 139 S. Ct. at 2124 (emphasis added) (quoting *Reynolds*, 565 U.S. at 440–41, 443).

[27] *Id.* at 2125 (citations omitted).

Congress expressing concern about sex offenders "'missing'" from state registries.[28] The SORNA delegation of authority was intended to provide the Attorney General

> the time needed (if any) to address the various implementation issues involved in getting pre-Act offenders into the registration system. "Specify the applicability" [in the SORNA delegation] thus does not mean "specify *whether* to apply SORNA" to pre-Act offenders at all, even though everything else in the Act commands their coverage. The phrase instead means "specify *how* to apply SORNA" to pre-Act offenders if transitional difficulties require some delay. In that way, the [delegating SORNA statute and the structure of SORNA] . . . giv[e] the Attorney General only time-limited latitude to excuse pre-Act offenders from the statute's requirements. Under the law, he had to order their registration as soon as feasible.[29]

Justice Kagan reasoned that because the congressional delegation was directed at practical issues regarding the implementation of retroactivity the "intelligible principle" delegation requirement was satisfied. The authority delegated to the Attorney General was "administrative" and concerned "transitional" issues consistent with the congressional desire to register pre-Act offenders as "as soon as feasible."[30] Indeed, she reasoned the authority delegated was "distinctly small-bore," compared to delegations the Court upheld before, and fell "well within constitutional bounds."[31]

II. PLUMBING THE SORNA HISTORICAL RECORD

Before turning to the Gorsuch dissent, it is important to provide a more accurate account of the circumstances leading to SORNA. As Justice Kagan noted, the law in significant part was motivated by concern over registry "loopholes," seeking, in the words of the enabling statute, to establish a "comprehensive national system for the registration of sex offenders and offenders against children."[32] Members of Congress did very often express concern over "missing" and "lost" sex offenders, but Justice Kagan was incorrect in inferring that the public statements demonstrated

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[28] *Id.* at 2127–28.

[29] *Id.* at 2128 (citations omitted).

[30] *Id.* at 2139. *See also id.* at 2130 ("Among the judgments often left to executive officials are ones involving feasibility. . . . In those delegations, Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge. So too in SORNA.").

[31] *Id.* at 2124.

[32] 34 U.S.C. § 20901 (2017) (transferred from 42 U.S.C. § 16901).

that retroactive application of SORNA was "front and center in Congress's thinking."[33]

Closer examination of the statements makes clear that they were instead motivated by concerns over what members of Congress saw as weak state registration and notification laws ("loopholes," "deficiencies") and their lack of uniformity ("disparities").[34] As Senator Orrin Hatch (R-Utah), a co-sponsor of the legislation, explained, SORNA promised creation of "uniform standards for the registration of sex offenders," emphasizing that it was

> critical to sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders. . . . Laws regarding registration for sex offenders have not been consistent from State to State[;] now all States will lock arms and present a unified front in the battle to protect children. Web sites that have been weak in the past, due to weak laws and haphazard updating and based on inaccurate information, will now be accurate, updated and useful for finding sex offenders.[35]

Multiple other examples support the conclusion that retroactivity was not foremost in the mind of Congress. Senator Joseph Biden (D-DE), another co-sponsor, urged that the AWA was needed to remedy perceived deficiencies in prior congressional efforts: "[t]his is about uniting 50 States in common purpose and in league with one another to prevent these lowlifes from slipping through the cracks. So we recognize that what we have done in the past did not do all we wanted to do."[36] State registration and notification laws, according to Senator Arlen Specter (R-PA), had "proved to be relatively ineffective, which requires the Federal Government to act on the national level."[37] Representative Ginny Brown-Waite (R-FL), sponsor of the legislation in the House, stated that "Congress has a duty to act and to protect our children nationwide, because these predators move from state to

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[33] *Gundy*, 139 S. Ct. at 2127.

[34] The Court's prior decision in *Reynolds v. United States*, 556 U.S. 432, 442–33 (2012) contains a similar misunderstanding of the congressional record. *See id.* at 442 ("The Act's history also reveals that many of its supporters placed considerable importance upon the registration of pre-Act offenders.").

[35] 152 CONG. REC. S8012, S8013 (daily ed. July 20, 2006) (statement of Sen. Hatch); *see also id.* (stating that it is "critical to sew together the patch-work quilt of 50 different State attempts to identi[f]y and keep track of sex offenders.").

[36] *Id.* at S8013 (statement of Sen. Biden).

[37] *Id.* at S8029 (statement of Sen. Specter). *See also, e.g.*, *id.* at S8020 (statement of Sen. Cantwell) ("Child sex offenders have exploited this stunning lack of uniformity, and the consequences have been tragic. Twenty percent of the Nation's 560,000 sex offenders are 'lost' because State offender registry programs are not coordinated well enough.").

state."[38] Representative Howard Coble (R-N.C.), Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security considering the bill, stated that

> [t]here is a wide disparity in the requirements of each State, and there is little to no infrastructure needed to ensure registration when sex offenders move from one State to another or when a sex offender enters another State to go to work or to enroll in a school. There's a strong need for more consistency and uniformity among State programs.[39]

Previously, the Supreme Court itself recognized that Congress sought to remedy state deficiencies and disuniformity. In one of its several earlier cases addressing an aspect of SORNA, *Nichols v. United States*,[40] the Court stated that "[w]e are mindful that SORNA's purpose was to 'make more uniform what had remained 'a patchwork of federal and 50 individual state registration systems,' with 'loopholes and deficiencies' that had resulted in an estimated 100,000 sex offenders becoming 'missing' or 'lost.'"[41]

The broader legislative history of what became SORNA similarly undermines Justice Kagan's assertion that Congress delegated authority merely on "feasibility" and implementation issues, not whether retroactivity itself should be required. One indication lies in the fact that early iterations of the House bill required

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[38] House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (June 9, 2005) (statement of Rep. Brown-Waite).

[39] *Id.* (statement of Rep. Coble). Ernie Allen, President and CEO of the National Center for Missing and Exploited Children, testifying before the House Judiciary Committee, emphasized what he saw as the difficulties created by the lack of "consistency" and "uniformity" in state laws that permitted registrants to "forum-shop" among states. *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to Be Done?*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 109th Cong. 19 (2005) (statement of Ernie Allen). "The public," Allen urged, "has a right to know about all registered sex offenders living in our communities. The amount of protection a child is given shouldn't depend on the state in which that child lives. There is clearly a need for more uniformity among state programs of community notification of sex offenders." A "seamless, coordinated, uniform system that works" was needed and states should disclose information on all registrants, not merely those deemed most likely to recidivate. *Id.*

[40] Nichols v. United States, 136 S. Ct. 1113 (2016).

[41] *Id.* at 1119 (quoting United States v. Kebodeaux, 133 S. Ct. 2496, 2505 (2013) (citation omitted)). The number of "lost" or "missing" convicted sex offenders invoked by members of Congress varied over time, ranging from 100,000 to 150,000. Research has shown that the 100,000 "missing" estimate is "highly inflated." Jill S. Levenson & Andrew J. Harris, *100,000 Sex Offenders Missing . . . or Are They? Deconstruction of an Urban Legend*, 23 CRIM. JUST. POL'Y REV. 375, 383 (2012).

retroactivity,[42] yet the Senate bill contained discretionary language strikingly similar to that ultimately enacted.[43]

The contingency of retroactivity is further highlighted in post-SORNA enactment pronouncements by the Attorney General. The Attorney General's interim rule issued in February 2007 acknowledged the uncertainty of retroactivity, stating

> *The current rulemaking serves the . . . immediately necessary purpose of foreclosing any dispute as to whether SORNA is applicable where the conviction for the predicate sex offense occurred prior to the enactment of SORNA.* This issue is of fundamental importance to the initial operation of SORNA, and to its practical scope for many years, since it determines the applicability of SORNA's requirements to virtually the entire existing sex offender population.[44]

Even more telling, the rule stated that the "Attorney General exercises his authority [under SORNA] . . . to specify this scope of application of SORNA, *regardless of whether SORNA would apply with such scope absent this rule . . . .*"[45] Later, the rule stated that SORNA should apply immediately because it was "*necessary to eliminate any uncertainty* about the Act's requirements . . . to sex offenders whose predicate convictions predate the enactment of SORNA."[46]

In the wake of the interim rule's publication in the Federal Register, multiple states, organizations, and individuals filed comments objecting to retroactivity, expressing concern over its appropriateness in principle and cost.[47] The National Conference for State Legislatures filed a comment stating its opposition to retroactivity "so as to respect state sovereignty over the treatment of sex offenders as laid out in each state's respective sex offender registry provisions."[48] A letter

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[42] *See, e.g.*, H.R. 4472, 109th Cong. § 111(3) (passed by House of Representatives on Mar. 8, 2006) (defining covered sex offender to include individuals convicted "before or after the enactment" of the law); *id.* § 113(d) ("RETROACTIVE DUTY TO REGISTER.—The Attorney General shall prescribe a method for the registration of sex offenders convicted before the enactment of this Act . . . ").

[43] *See* S. 1086, 109th Cong. § 104(a)(8) (passed by the U.S. Senate on May 4, 2006).

[44] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,896 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) (emphasis added).

[45] *Id.* (emphasis added)

[46] *Id.* (emphasis added)

[47] Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 1002 (2010) (internal citation omitted). The other most common focus of concern and criticism was the SORNA requirement that certain adjudicated juvenile offenders be subject to SORNA. *See id.*

[48] *Id.*

from the chair of Idaho's Criminal Justice Commission condemned the "breadth of the duties of the state" resulting from the retroactivity requirement, calling it "an onerous and unworkable burden on the state and its limited resources."[49] A letter jointly signed by the heads of six New York state agencies urged that jurisdictions be afforded discretion on the retroactivity question:

> When each state first created its sex offender registry, it made a choice about how the registration requirements would be applied to previously convicted offenders.
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> The decision on retroactive applicability raises substantial practical and policy concerns that are more appropriately addressed by the individual states. [The guidelines] will greatly expand the pool of registerable sex offenders in New York State. It will also require the State to search the prior criminal history of each person entering the criminal justice system to determine whether, at any time in the past, he or she was convicted of, or adjudicated for, a qualifying sex offense. This is both burdensome and unworkable because in many cases older records will no longer be available, or they will be incomplete or inaccurate.[50]

The New York letter added that retroactivity expanded the pool of registerable offenders, which would "exacerbate the difficulties that states are now facing in finding appropriate housing for sex offenders."[51] Other states filed similarly critical comments.[52]

Further evidence of the contingency of retroactivity is found in the final rule, issued in late December, 2010. In it the Attorney General stated that "Congress at the very least placed it within the Attorney General's discretion to apply SORNA's requirements to sex offenders with pre-SORNA convictions if he determines (as he has) that the public benefits of doing so outweigh any adverse effects."[53] Moreover, the Attorney General's rule-making was legally justified

> regardless of whether (i) SORNA's requirements apply of their own force to sex offenders with pre-SORNA convictions, and the interim rule merely confirmed that fact, *or (ii) the applicability of SORNA's requirements to*

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[49] *Id.* at 1003.

[50] *Id.*

[51] *Id.* at 1004.

[52] *See id.* at 1004, 1008–09.

[53] Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010) (codified at 28 C.F.R. pt. 72).

> *sex offenders with pre-SORNA convictions depends on rulemaking by the Attorney General*.[54]

In short, the congressional and rule-making record makes clear that the nature and scope of the authority delegated to the Attorney General regarding the retroactivity of SORNA was anything but certain. Furthermore, gauged by the comments received by the Attorney General, the decision to apply SORNA retroactively was very controversial, engendering very significant push back from the states, underscoring that the issue was not, as Justice Kagan put it, a delegated "small bore detail."[55]

Finally, Justice Kagan's invocation of the Court's prior decision in *Reynolds* was off-base. In *Reynolds*, unlike in *Gundy*, the federal government argued that the SORNA delegation afforded the Attorney General discretion to make registration retroactive, not simply devise rules about the implementation of retroactivity.[56] The *Reynolds* majority (7-2) concluded that the SORNA delegation "could only" mean that retroactivity was not the rule until the Attorney General said so.[57] Justice Scalia, in a dissent joined by Justice Ginsburg, disagreed and wrote that SORNA's requirements "apply of their own force, without action by the Attorney General."[58] He pointed out that a contrary interpretation would create a nondelegation problem: "it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals."[59] Justice Scalia's postulated concern regarding nondelegation would assume real form a few years later in *Gundy*.[60]

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[54] *Id.* at 81,851 (emphasis added).

[55] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).

[56] In *Reynolds*, the federal government in its brief stated that "[r]ead naturally, therefore, the first clause of Subsection (d) delegates to the Attorney General the authority to 'specify' *whether or not SORNA's registration requirements apply to sex offenders convicted before* SORNA's enactment or implementation in a particular jurisdiction." Brief for United States, *Reynolds* (No. 10-6549), 2011 WL 2533008, at 21 (emphasis added).

[57] Reynolds v. United States, 565 U.S. 432, 440–41 (2012) (reading SORNA delegation provision as "conferring the authority to apply" provisions to pre-Act offenders and that the "registration requirements do not apply until the Attorney General so specifies").

[58] *Id.* at 450 (Scalia, J., dissenting).

[59] *Id*.

[60] Justice Ginsburg's decision to concur with Justice Kagan's plurality opinion in *Gundy* would thus appear to be at odds with her concurrence with Justice Scalia in *Reynolds*.

III. GORSUCH'S *GUNDY* DISSENT

Justice Gorsuch began his dissent in dramatic fashion, contending that SORNA "endow[ed] the nation's chief prosecutor with the power to write his own criminal code affecting the lives of a half million citizens."[61] He then wrote that "[y]es, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?"[62]

Justice Gorsuch thereafter surveyed the reasons supporting the nondelegation doctrine and why the SORNA delegation violated it. He emphasized the structural constitutional reason behind separation of powers and the Framers' belief that "the new federal government's most dangerous power was the power to enact laws restricting the people's liberty."[63] Among the limits would be accountability: "the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people should know, without ambiguity, whom to hold accountable for the laws they would have to follow."[64] Delegation by Congress to the executive undercuts this prospect.[65] The job therefore fell to the judiciary to police when "constitutional lines are crossed": "The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch."[66]

Justice Gorsuch then turned to the question of how delegation is to be assessed, inferring three "guiding principles" consistent with the Framers' intent. First, after making the "policy decisions," Congress can "authorize another branch to 'fill up the details'"[67]; second, Congress may make the application of its rule "depend on executive fact-finding"[68]; and third, Congress may "assign the executive and judicial branches certain non-legislative responsibilities," such as when a statute concerns

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[61] Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *see also id.* at 2132 ("Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate."); *id.* at 2133 ("These unbounded policy choices have profound consequences for the people they affect.").

[62] *Id.* at 2131.

[63] *Id.* at 2134.

[64] *Id.*

[65] *Id.* at 2135.

[66] *Id.*

[67] *Id.* at 2136 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825)).

[68] *Id.*

foreign affairs (mainly an executive prerogative).[69] Thereafter, Gorsuch surveyed the many cases since the 1930s that ultimately gave rise to the "intelligible principle" standard used in modern times, which he termed "mutated" with "no basis in the original meaning of the Constitution, its history, or even the decision from which it was plucked."[70] Distilling what he took as the gist of the Court's analysis in *Touby v. United States*,[71] Gorsuch then identified what he saw as a truer enunciation of the intelligible principle test, asking:

> [1] Does the statute assign to the executive only the responsibility to make factual findings? [2] Does it set forth the facts that the executive must consider and the criteria against which to measure them? And [3] most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.[72]

Justice Gorsuch, however, elected not to apply the foregoing test but rather applied what he saw as the Framers' "guiding principles," noted at the outset of the preceding paragraph. Applying the first principle, Gorsuch concluded that "[i]t's hard to see how SORNA leaves the Attorney General with only details to fill up."[73]

> As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere "details."[74]

Delegating retroactivity, moreover, appeared to be a "deliberate" political decision: "Because members of Congress could not reach consensus on the treatment of pre-Act offenders, it seems this was one of those situations where they found it expedient

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[69] *Id.* at 2137.

[70] *Id.* at 2139.

[71] Touby v. United States, 500 U.S. 160 (1991).

[72] *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

[73] *Id.* at 2143.

[74] *Id.*

to hand off the job to the executive and direct there the blame for any later problems that might emerge."[75]

Turning to the second principle, Gorsuch reasoned that Congress could have conditioned retroactivity on "executive fact-finding," such as regarding criteria about particular offenders posing risk.[76] Again, however, SORNA did not do so: "Far from deciding the factual predicates to a rule set forth by statute, the Attorney General himself acknowledges that the law entitled him to make his own policy decisions."[77]

Finally, SORNA did not involve "overlapping authority with the executive," but rather provided the Attorney General authority to "'prescrib[e] the rules by which the duties and rights' of citizens are determined, a quintessentially legislative power."[78] With SORNA, Gorsuch reasoned, Congress enacted a statute with a delegation that "sounds all the alarms the founders left for us":

> Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA's application to pre-Act offenders, it passed the potato to the Attorney General. And freed from the need to assemble a broad supermajority for his views, the Attorney General did not hesitate to apply the statute retroactively to a politically unpopular minority.[79]

By delegating, Congress could claim credit for "'comprehensively' addressing the problem of the entire existing population of sex offenders (who can object to that?), while in fact leaving the Attorney General to sort it out."[80] Continuing to train his focus on the fact that sex offenders, a despised political sub-population, were targeted, Gorsuch wrote:

> It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive *carte blanche* to write laws for sex offenders is the same rule that protects everyone else. Nor is it hard to imagine how the power at issue in this case—the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties—could be abused in other settings. To allow

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 2143–44 (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[79] *Id.* at 2144.

[80] *Id.*

> the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to "'unit[e]'" the "'legislative and executive powers . . . in the same person'"—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.[81]

Concluding, Gorsuch wrote:

> In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."[82]

IV. DELEGATING CRIMINAL JUSTICE AUTHORITY

Viewed as a whole, the Gorsuch dissent has several notable features. First, his point about governmental accountability is well-taken. Congress engaged in an obvious political dodge when it delegated authority to the Attorney General to make SORNA retroactive. However, for reasons that are unclear, Justice Gorsuch's several eloquent references to the need to protect a despised minority, convicted sex offenders, seemed misplaced. In targeting convicted sex offenders with SORNA, Congress was not passing off a hot "potato." Congress and the states since the early 1990s repeatedly enacted harsh registration and notification laws targeting convicted sex offenders.[83] Rather, what Congress sought to avoid was political accountability regarding the impact of retroactivity of SORNA on states, a federalism issue, which the state blow-back recounted above highlights was quite real.[84]

Second, Justice Gorsuch was right in concluding that retroactivity was not a "small bore detail," but rather was a fundamental policy issue to be decided,[85] with

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[81] *Id.* at 2144–45 (citations omitted).

[82] *Id.* at 2148 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring)).

[83] *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 85–108 (2009) (discussing political catalysts behind the harsh state and federal registration and notification laws enacted since the early 1990s).

[84] *See supra* notes 47–52 and accompanying text.

[85] Justice Alito's concurrence in *Gundy* with Justice Kagan's contrary view is made all the more curious in light of his recognition a few years earlier that in SORNA "Congress elected not to decide for itself whether [SORNA's] registration requirements . . . would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that question." Carr v. United States, 560 U.S. 438, 466 (2010) (Alito, J., dissenting); *see also id.* at 466 n.6 ("The clear negative implication of that delegation is that,

enormous social, fiscal, and political ramifications, which Congress sought to avoid. In delegating this unconditional authority, federal lawmakers improperly ceded their basic law-making power and the accountability associated with it. When they did so, moreover, they failed to provide the necessary "intelligible principle" to guide the discretion they delegated, directing only that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . ."[86] Indeed, the unintelligibility of the delegation is evidenced in varied positions and statements contained in the several guidelines promulgated by the Attorney General, noted above.[87] Even if Congress itself thought it was clear in its delegation, the fact that the Attorney General voiced uncertainty about what it was empowered to do should have precluded *Gundy* from being the "easy" case Justice Kagan proclaimed it to be. If anything, the uncertainty should have made the outcome an easy one in Gundy's favor.

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without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions.").

This was also the conclusion of the Eleventh Circuit, in a per curiam opinion concluding that a federal district court lacked authority to make SORNA retroactive because Congress vested the discretionary authority in the Attorney General. *See* United States v. Madera, 528 F.3d 852, 857–59 (11th Cir. 2008):

> Congress expressly reserved the retroactivity determination to be made by the Attorney General . . . . The plain language of the statute makes clear that Congress gave only the Attorney General the authority to determine SORNA's retroactivity. . . . Congress's use of the word "shall" indicates that Congress was issuing a directive to the Attorney General specifically to make the determination. . . . The district court clearly erred by usurping the role of the Attorney General in preemptively determining SORNA's retroactive application.
>
> In so finding, we reject the Government's argument that the Attorney General was not given full discretion to determine whether SORNA would be retroactively applied to sex offenders convicted before its enactment. . . .
>
> Thus, we find that Congress vested the Attorney General with sole discretion to determine SORNA's retroactivity. Our reading of the statute is supported by the fact that the Attorney General in fact exercised his full discretion to determine its retroactivity when he issued the interim rule stating, "The requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R § 72.3. It is clear that this pronouncement is more than a mere regulation regarding the mechanical aspects of how previously convicted sex offenders should initially register under the statute.

Other courts, in cases also involving SORNA delegation challenges, likewise regarded the delegation as concerning whether retroactivity was proper (not simply how it was to be implemented). *See, e.g.*, United States v. Rickett, 535 Fed. Appx. 668, 673 (10th Cir. 2013) ("As written, § 16913(d) gives the Attorney General discretion to decide whether and how SORNA should be applied retroactively."); United States v. Johnson, 632 F.3d 912, 923 (5th Cir. 2011) ("This language is not ambiguous. Following the plain meaning rule, this phrase delegates to the Attorney General the decision of whether and how the SORNA registration requirements apply to offenders with pre-enactment convictions.").

[86] 34 U.S.C. § 20913(d) (2017).

[87] *See supra* notes 44–46 & 53–54 and accompanying text.

Gundy, as noted at the outset, was a potential blockbuster decision. Justice Kagan, writing for the plurality, was obviously worried that finding in favor of Herman Gundy would be a very significant blow to the administrative state. Near the end of her opinion she acknowledged that "[i]f SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[88]

Personally, I share the view that delegation in the modern era is necessary and can be beneficial.[89] However, Congress simply went too far with SORNA. It not only impermissibly delegated a basic policy decision to the executive branch,[90] it failed to provide any guidance on how the decision was to be made.[91] Although the intelligible principle rubric is imperfect, it provides a basis for calibrating and limiting when and how Congress can cede to another branch some of its Article I law-making power.[92] That is, if it is applied, which it was not in *Gundy*. In SORNA,

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[88] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).

[89] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (stating that separation of powers does "not prevent Congress from obtaining the assistance of its coordinate Branches," a recognition "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power…."). Whether in fact the pre-New Deal era was the halcyon time nondelegation proponents assert it to be, it is worth noting, is subject to dispute. *See* Keith E. Wittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2012) (concluding, based on study of nondelegation challenges between 1789 and 1940, that courts did not vigorously enforce the doctrine and that decisions were based on pragmatic considerations). *But see* Joseph Postell & Paul D. Marino, *Not Dead Yet—Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONSTIT. STUDIES 41 (2018) (providing critique of Wittington and Iuliano study and questioning the relatively low success rates of nondelegation challenges they found and broader impact of the doctrine).

[90] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424 (1944) (stating that "[t]he essentials of the legislative function are the determination of legislative policy and its . . . promulgation as a defined and binding rule of conduct").

[91] Indicative of the dearth of guidance, the Attorney General over time, and across presidential administrations, adopted varied positions on the retroactive scope of SORNA. In late February 2007, the interim rule stated that all pre-SORNA offenders must register. *See* Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,896 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72). This position was reflected in proposed guidelines issued in late May 2007. The National Guidelines for Sex Offender Registration and Notification; Notice, 72 Fed. Reg. 30210 (May 30, 2007). Later, in early June 2008, the population was truncated: covering only "sex offenders convicted prior to the enactment of SORNA or its implementation in the jurisdiction, if they remain in the system as prisoners, supervisees, or registrants, or if they reenter the system because of subsequent criminal convictions." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,035, 38,046 (July 2, 2008). The final rule, issued in late December 2010, echoed this position. Applicability of the Sex Offender Registration and Notification Act, Final Rule, 75 Fed. Reg. 81,849 (Dec. 29, 2010). In 2011, the scope of retroactivity was again altered, limiting the population of criminal justice system reentrants subject to SORNA to only those convicted of a felony (of any kind). Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Jan. 11, 2011).

[92] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407 (1928) (stating that when Congress delegates authority pursuant to an intelligible principle the delegee does not usurp legislative

Congress simply delegated a basic and very important policy question for decision to the Attorney General, without any guidance or constraints on how the discretion was to be exercised.[93] *Gundy*, like the two other historic instances in which the Court found improper delegations, was an instance where Congress "failed to articulate any policy or standard" to guide the exercise of executive branch discretion.[94] Justice Gorsuch, for his part, advanced several "guiding principles" encompassing a more demanding nondelegation standard that would, as Justice Kagan feared, hamstring and perhaps eventually dismantle much of the administrative state.

A preferable approach comes from, interestingly enough, Justice Gorsuch, when he sat on the Tenth Circuit Court of Appeals. In *United States v. Nichols*,[95] in a dissent from a denial of rehearing en banc of a panel decision rejecting a SORNA nondelegation challenge, then-Judge Gorsuch made many of the same arguments advanced in *Gundy*,[96] but he sharpened his focus to criminal justice-related delegations in particular. He wrote that

> It's easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation—something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider. . . . Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. . . . When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes—and so many created by executive regulation—

power because such "power has already been exercised legislatively by the body vested with that power").

[93] *See* United States v. Fuller, 627 F.3d 499, 511 (2d Cir. 2010) (Raggi, J., concurring) (noting that she "fail[ed] to see what guidance [SORNA] provide[d] to the Attorney General in exercising legislative authority to decide whether or not SORNA's registration requirements should apply to prior offenders at all").

[94] Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (referring to Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

[95] United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (Mem. Op.). Ultimately, the Supreme Court granted certiorari in *Nichols*, reversing the Tenth Circuit on the narrower statutory ground that SORNA did not require a U.S. citizen to update his registry information when he left his home in Kansas and moved to the Philippines. Nichols v. United States, 136 S. Ct. 1113, 1118-19 (2016).

[96] Even before *Nichols*, Gorsuch had expressed his concern over the SORNA retroactivity delegation. *See* United States v. Hinckley, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., dissenting).

> that scholars no longer try to keep count and actually debate their number?[97]

In *Nichols*, Gorsuch noted that in *Touby v. United States*[98] the Supreme Court suggested but did not require that "in the criminal context Congress must provide more 'meaningful[]' guidance than an 'intelligible principle.'"[99] In *Touby*, the Supreme Court considered whether Congress must provide "more than an intelligible principle" when it "authorizes another Branch to promulgate regulations that contemplate criminal sanctions," but did not answer the question because it found that sufficient guidance was provided.[100] The Court added that its "cases are not entirely clear as to whether more specific guidance [than that contained in the intelligible principle standard] is in fact required."[101]

Gorsuch, interpreting *Touby*, identified several analytic criteria. First, "Congress must set forth a clear and generally applicable rule"; second, that rule must "hinge[] on a factual determination by the Executive"; and third, "the statute [must] provide[] criteria the Executive must employ when making its finding."[102] Gorsuch wrote that "[t]hese three criteria could easily be applied to most any delegation challenge in the criminal context and provide the more meaningful standard the Court has long sought."[103] The delegation at issue in *Nichols* (the same as *Gundy*) failed the standard, because Congress simply "pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out."[104]

In *Gundy*, Justice Gorsuch again invoked *Touby*, yet drew from it different criteria to adjudge whether an intelligible principle was provided, and made no mention (as he had in *Nichols*) of its special applicability to delegations of criminal justice authority. If in fact Justice Gorsuch has relented on his preference for a distinct nondelegation standard in criminal cases, it would be unfortunate because there is much to commend such an approach. As I have written elsewhere, with criminal justice agency delegations "[n]ot only do the policy matters in question have unique normative importance affecting the liberty of individual citizens, but

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[97] *Nichols*, 784 F.3d at 672–73 (citations omitted) (Gorsuch, J., dissenting from denial of rehearing en banc).

[98] Touby v. United States, 500 U.S. 160, 166 (1991).

[99] *Nichols*, 784 F.3d at 672 (Gorsuch, J., dissenting).

[100] *Touby*, 500 U.S. at 165–66. *Touby* involved a challenge to authority delegated to the Attorney General to designate material as a controlled substance under the federal Controlled Substances Act, and the Court found that Congress had "placed multiple specific restrictions" on the delegation that "meaningfully constrain[ed] the Attorney General's discretion." *Id.* at 166.

[101] *Id.*

[102] *Nichols*, 784 F.3d at 673 (Gorsuch, J., dissenting).

[103] *Id.*

[104] *Id.* at 674.

they also lack the technical complexity that typically justifies delegation based on agency expertise."[105]

Such a more demanding approach would not be without precedent. James Madison voiced particular concern about delegations regarding rules allowing for criminal penalties, writing that "[d]etails, to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law."[106] More recently, Judge Jeffrey Sutton, of the Sixth Circuit Court of Appeals, in a case challenging a policy statement by the Department of Housing and Urban Development having the effect of criminalizing certain conduct, wrote that "the Constitution may well . . . require Congress to state more than an 'intelligible principle' when leaving the definition of crime to the executive."[107] Florida, interpreting its state constitution, is one state that has imposed greater limits on delegations of legislative authority regarding criminal justice matters.[108]

Because such an alternate test, whatever its precise form, would only be triggered when a delegation concerns a criminal justice policy, it will of necessity run up against an age-old judicial difficulty regarding how to distinguish civil from criminal sanctions.[109] Indeed, Justice Gorsuch's concurring opinion in the term preceding *Gundy*, in *Sessions v. Dimaya*,[110] which involved a vagueness challenge to the definition of "crime of violence" in the Immigration and Nationality Act, manifested his concern over the increasing blur between civil and criminal sanctions, which might account for his reluctance in *Gundy* to explicitly suggest *Touby* as an alternative for criminal law delegations.[111] Complicating matters, delineating a matter as civil or criminal will not be aided by the particular agency that has delegated the authority, as agencies and entities other than the Attorney General (in the Department of Justice) have criminal justice turf, including the Securities and Exchange Commission and the Environmental Protection Agency.

In the end, applying a version of *Touby* would prove challenging because it will entail two judicial line-drawing challenges: whether the delegated issue is criminal

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[105] Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 8 OHIO ST. J. CRIM. L. 51, 115 n.367 (2008).

[106] THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99 30 (Jonathan Elliot ed., Washington, D.C. Published by the editor 1832).

[107] Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring).

[108] *See* B.H. v. State, 645 So. 2d 987, 993 (Fla. 1994) ("The delegation of authority to define a crime, for example, is of such a different magnitude from noncriminal cases that more stringent rules and greater scrutiny is required.").

[109] *See generally* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261 (1998).

[110] Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

[111] *Id.* at 1223–34 (Gorsuch, J., concurring). Or, perhaps Justice Gorsuch simply could not sell Chief Justice Roberts and Justice Thomas, who concurred with his *Gundy* dissent, on a narrower, criminal justice-centric test.

in nature and whether the delegation itself was proper. A positive byproduct, however, could be the development of a much-needed, more sensible and coherent doctrinal basis to distinguish civil and criminal sanctions.[112] Furthermore, a more robust, criminal justice-specific nondelegation doctrine would hold promise for a doctrinal compromise of sorts, for liberals and conservatives alike. For liberals, the approach would cabin the power to criminalize to some extent, and would preserve the status quo regarding the nondelegation doctrine more generally. For conservatives, the approach would rein in delegation in a realm (personal liberty and criminal stigmatization) that should resonate. Finally, a criminal justice-specific approach might prove more stable, and more principled in the long term, as it will arise in an arena of agency work less susceptible to being politically outcome-oriented, and contingent upon presidential administration (and the Justices') policy preferences, such as immigration, environmental, and election-related matters.

V. CONCLUSION

Gundy v. United States turned out to be something of a bust, maintaining—for the time being at least—the nondelegation doctrine as it has been known for decades. The Court could have applied the prevailing doctrine, found an "intelligible principle" lacking, and granted Herman Gundy relief (along with thousands of convicted sex offenders like him). Alternatively, it could have advanced a new incarnation of the nondelegation doctrine, a more demanding one limited to criminal justice-related delegations. Doing either might have at least bought some time, and headed off the lengthy dissent by Justice Gorsuch, which has not gone unnoticed by conservative jurists.[113] By maintaining the status quo, however, the Court perhaps set the stage for imposition of a much more substantial limit on the delegation authority of Congress in a coming term. Time will tell when and if this comes to pass.

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[112] It remains unclear whether the often high-stakes political consequences of nondelegation cases will actually result in a superior test. Because of this practical concern, and perhaps for legitimate constitutional reasons, the Court might, consistent with the varied doctrinal demands associated with drawing the lines in different contexts (e.g., the Ex Post Facto Clause), devise a test for nondelegation cases alone.

[113] *See, e.g.*, Faludi v. U.S. Shale Solutions, L.L.C., 936 F.3d 215, 222 (5th. Cir. 2019) (Ho, J., dissenting) (citing the Gorsuch dissent and noting that "four members of the Supreme Court have recently expressed interest in breathing life back into the [nondelegation] doctrine.").